559): South Carolina, (*Hypes* v. *Southern Ry. Co.*, (1902), 82 S. C. 315, 64 S. E. 395, 26 L. R. A. (N. S.) 873, 17 Ann. Cas. 620); Texas (*Southwestern Telegraph Co.* v. *Long*, (1916),—Tex. Cri. App.—, 183 S. W. 421); and *Grand Union Tea Co.* v. *Lord*, (1916, E. Dist. Va.), 231 Fed. R. 390.

There seem to be no English cases directly holding a corporation liable for slander, but in *Citizens Life Assurance Co., Ltd.*, v. *Brown*, (1904), A. C. 423, 73 L. J. P. C. N. S. 102, 90 L. T. N. S. 739, 20 T. L. R 497, 53 W. R. 176, 6 B. R. C. 675, the Privy Council rules that a corporation is liable for *libel*, "Although the servant may have had no actual authority, express or implied, to write the libel complained of, if he did so in the course of an employment which is authorized." The leading English authors state the corporation's liability for torts in terms broad enough to include liability for slander by an agent in the course of his employment, and within the scope of his general authority, but cite no cases of slander. See ODGERS, LIBEL and SLANDER, 5th Ed., p. 592; CLERK and LINDSELL, TORTS, Canadian Ed. 1908, pp. 60-63; POLLOCK, TORTS, 9th Ed. 1912, pp. 61-63; SALMOND, TORTS, 4th Ed. 1916, pp. 60-64; HALSBURY'S LAWS OF ENGLAND, Vol. 5, Companies, 1910, p. 309; HAMILTON'S COMPANY LAW, 2d. Ed., 1901, p. 121, Canadian Ed., 1911, pp. 108-9; LINDLEY, COMPANY LAW, 6th. Ed. 1902, p. 257 et seq.; PALMER, COMPANY PRECEDENTS, Vol. 1, 1912, p. 38.

There have been several Scotch cases. and in *Finburgh* v. *Moss' Empires, Ltd.*, (1908), S. C. 928, it was expressly ruled that "an employer (a corporation), is liable for a verbal slander uttered by his servant in the course of the servant's employment and for the benefit of the employer." The court relies upon *Barwick* v. *English Joint Stock Bank*, (1867), L. R. 2 Ex. 259, (a case of fraud), and *Citizen's Life Assurance Co., Ltd.*, v. *Brown, Supra.* In *Aiken* v. *Caledonian Ry. Co.*, (1913), S. C. 66, where the cases are reviewed, the judges insist that *"for the benefit of the employer,"* are important on the question of liability,—not necessarily meaning that the employer should reap some benefit from the use of the words, but the facts alleged and proved should show "that the verbal slander complained of is a slander that should be held in law to be imputable to the principals, so as to justify the issue that it was a slander uttered by them, by or through their servant." See also *Mandelston* v. *North British Ry.*, (1917), S. C. 442, to same effect. H. L. W.

RE-WRITING THE STATUTE OF FRAUDS: PART PERFORMANCE IN EQUITY.—One of the most striking examples of judicial legislation is that process whereby courts of equity, from the end of the seventeenth century onwards, have in no small measure re-written the Statute of Frauds. Exception was added to exception until the doctrine known as "part performance" became firmly established. The doctrine was not evolved consistently and the basis of some applications of it is obscure. One who follows Sir Edward Fry's admirable but futile attempt (Fry, SPECIFIC PERFORMANCE (ed. 5) §§ 580, ff.) to systematize the variant decisions of the English courts must feel doubtful whether any single theory will explain all the intricacies of part per-

formance. Mr. Pomeroy sought to support the doctrine upon the all-embracing principle of fraud (Pomeroy, CONTRACTS (ed. 2) §§ 103, 104), but unless it be fraud to fail to carry out a promise deliberately made when another has acted upon it, this explanation fails.

The Statute of Frauds (1677) was scarcely installed in the statute book, when LORD JEFFRIES, C., in *Butcher* v. *Stapely,* (1685), 1 Vernon 363, constructed an exception. Under a contract of sale the purchaser was let into possession and the Lord Chancellor declared that "inasmuch as possession was delivered according to the agreement he took the bargain to be executed" and the statute did not apply. No reason is disclosed for this holding unless it be that a contract executed upon one side is not within the contemplation of the statute: a dogma that cannot seriously be maintained. Subsequent decisions, however, followed *Butcher* v. *Stapely* with alacrity and it has long been settled law in England and most American jurisdictions that the receipt of possession from vendor or lessor takes the case out of the statute in favor of the vendee or lessee. Ames, CASES EQUITY, 279, n. 1. and cases cited. It is difficult to see what principle of equity underlies this exception and efforts to support it rationally have been singularly unhappy. Cf. JESSEL, M. R. in *Ungley* v. *Ungley,* L. R. 5 Ch. D. 887, 890; COOLEY, J., in *Lamb* v. *Hinman,* 46 Mich. 112, 116. Modern judges have been inclined to recognize that the exception of possession is exceedingly arbitrary and rests upon nothing more than authority and history. See the remark of Lord BLACKBURNE in *Madison* v. *Alderson,* L. R. 8 App. Cas. 467, 489, and WELLS, J., in *Glass* v. *Hulbert,* 102 Mass. 32-34. Indeed a number of American courts have declined to admit that mere possession is sufficient, 16 MICH. L. REV. 154, 155.

Probably to prevent the multiplication of arbitrary exceptions the principle was introduced that the alleged act of part performance must be of such a nature that it would in and of itself indicate unequivocally the existence of some contract concerning the particular land in question; parol evidence might then be admitted to show the nature of that contract. (Sir WILLIAM GRANT, M. R., in *Frame* v. *Dawson,* 14 Ves. 386.) Lord SELBOURNE sought to give a truly equitable flavor to this principle by adding that, once such an act is established, the enquiry must be directed to the respective equities of the parties. In his view the matter must have passed beyond the stage of mere contract through the altered situation of one of the parties produced by acts done in reliance upon the contract. "The choice is between undoing what has been done * * * and completing what has been left undone." *Maddison* v. *Alderson, supra.* Obviously this will depend upon striking a nice balance. But Lord SELBOURNE'S theory holds small comfort for a plaintiff in a common type of case. If A promises B that if B will take care of him for the rest of his life he (A) will leave Blackacre to B, a complete performance by B will not justify specific performance. The performance by B does not point unequivocally to any contract *concerning Blackacre.* The unfortunate position of such a plaintiff has led some courts to give relief despite the statute; the theory upon which this is most readily justified may be shortly described as that of 'irreparable injury.' This theory has been attributed to Lord COTTEN-

HAM (Cf. *Mundy* v. *Jolliffe,* 5 Mylne & Craig 167), though it is doubtful if he ever applied it to a case of the type under discussion; it seems to underlie the well-known case of *Rhodes* v. *Rhodes,* 3 Sand. Ch. 279, which is the leading authority in this country against the doctrine of *Maddison* v. *Alderson.* It must be evident that the theory of Lord COTTENHAM, thus applied, is inconsistent with that of Lord SELBOURNE. The tendency of the more recent decisions seems to be in the direction of respecting the statute; *Rhodes* v. *Rhodes,* for example, would probably not be followed in New York today. *Russell* v. *Briggs,* 165 N. Y. 500. Moreover there is observable a healthy effort to support such exceptions as remain upon some sound equitable basis.

Unfortunately this is not true of all courts. A number of recent decisions of the Supreme Court of Michigan have dealt with part performance without disclosing any principle of decision. In *Fowler* v. *Isbel* (1918) 168 N. W. 414, BROOKE, J., relied upon *Friend* v. *Smith,* 191 Mich. 99, and in *Bromeling* v. *Bromeling* (1918) 168 N. W. 431 KUHN, J., observed that *Ruch* v. *Ruch,* 159 Mich. 231, had settled the question. *Ruch* v. *Ruch* appears to invoke the doctrine of fraud by the somewhat vague statement that the Statute of Frauds is not a shield to protect fraud. *Friend* v. *Smith* cites a long line of Michigan cases, a number of which are not in point. (e. g., *Twiss* v. *George,* 33 Mich. 253, *Taft* v. *Taft,* 73 Mich. 502, in neither of which was the statute pleaded.) Those which are pertinent to the present discussion exhibit two common characteristics: (1). They dicuss in great detail the evidence presented, and rest content therewith. It is of course eminently proper that the court should satisfy itself that an oral contract is well established by the evidence; but upon no principle of equity can a contract be enforced merely because it is properly proven. Yet simply because the evidence was taken to establish the contract, specific performance was granted in *Fairfield* v. *Barbour,* 94 Mich. 152; *Welch* v. *Whelpley,* 62 Mich. 15, and *Russell* v. *Russell,* 94 Mich. 122. (2). In the second place, there is no adequate discussion of the principles underlying part performance nor is reference made to the decisions of other jurisdictions wherein such principles might be found. In *Pike* v. *Pike,* 121 Mich. 170, it is said that if a contract is "substantially executed it is taken out of the statute." In *Kinyon* v. *Young,* 44 Mich. 339, COOLEY, J., concedes that to make out his case the complainant must show "such acts of part performance as will justify its (the contract's) enforcement notwithstanding the failure to comply with the statute of frauds in making it." He seems, however, to feel it unnecessary to define what part performance is, to justify it by equitable theory, or to cite any adjudication upon the point. Further, after admitting that the "acts (i. e., of part performance) are not as conclusive as could be desired," he assents to the conclusion of the lower court that "there have not only been acts of part performance but that the contract has been completely performed * * * and nothing remains to make out the case of the complainant." Where Judge COOLEY led the way, his successors readily followed; and though counsel from time to time have endeavored to lure the court into a discussion of familiar cases decidedly by courts of other states and England, the judges have declined the invitation. This would be well enough if the court had once for

all examined the problem of part performance in its equitable aspects and determined upon some theory which it proposed to maintain. In such an inquiry it is submitted that a consideration of the classic cases would do no harm. The policy of the court has been otherwise. If there exist carefully reasoned decisions in Michigan dealing with this problem, the Supreme Court at its last term did not call attention to them. It is not pretended that *Fowler* v. *Isbell* and *Bromeling* v. *Bromeling, supra,* are erroneously decided or that the result does not make for 'justice;' but it is justice without law. It may be desirable to repeal the Statute of Frauds, though that is scarcely the function of a court of equity. It may even be desirable that new exceptions should be introduced by the courts, but if this is to be done, may one not hope that the court will somehow gain a perspective larger than is afforded by the 'equities' of any particular case? Is it too much to ask that the profession be given something more than a series of decisions on "the facts?" W. T. B.

CONTRACT OF INFANT—EVIDENCE, COMPETENCY OF WITNESS UNDER SURVIVORSHIP STATUTE.—Two questions are presented by the case of *Signaigo* v. *Signaigo,* (Mo. 1918), 205 S. W. Rep. 23: *First,* the enforcibility of the contract of an infant, fully performed by her, to live with a man and his wife as their adopted child so long as they should live, in consideration that the infant should have all the property of the foster parents upon their death; and *Second,* the competency of the consenting mother of the infant to testify in support of the infant's claim.

The proceeding was one in equity for the partition among his heirs at law, of the lands of which David Signaigo died seized. Edna Amrein was made a party on her petition setting up a claim to the lands under the contract above referred to. It was conceded that deceased died intestate and without having taken any formal steps to adopt the said Edna; that she did live with the said David Signaigo and his wife from the time she was fourteen years old, that being the time of the making of the contract, until the death of the said David some nine years later, his wife having pre-deceased him but a few months, and that no steps had been taken to actually transfer the title of his property to the said Edna.

The first question would seem not difficult of solution through the application of general principles quite well recognized by the courts of Missouri. In but one case is the infant's contract invalid because he is an infant, and that is where the contract is palpably to his injury, a proposition too elementary for the citation of authorities. There is nothing which marks this contract as belonging to this class.

The dissenting opinion proceeds upon the theory that the contract is one for adoption only, and that the only possible parties to such a contract are the natural and the adopting parents. And apparently forgetting that traffic in human beings is now unlawful, regards the infant as only the "subject matter" of the contract, and concludes that what the child may actually do toward the making of such a contract, or in performance of its terms, cannot affect its legal status.